

2011 WL 7561354 (Mich.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Michigan.
Wayne County

Verna ARRINGTON, Plaintiff,
v.
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Defendant.

No. 09-001127-NF.
March 4, 2011.

Defendant State Farm's Motion in Limine to Strike or Exclude Fees Charged by Eastpointe Transitional Living

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Mizerowski Smith, P.C., [Eric D. Smith](#) (P38961), Attorney for Defendant State Farm, 873 N. Mill Street, Plymouth, MI 48170, (734) 656-1500.

Hon. [Wendy M. Baxter](#).

NOW COMES the defendant, State Farm Mutual Automobile Insurance Company, by and through its attorneys Mizerowski Smith PC, by Eric D. Smith, and moves this court for an order striking or excluding the fees charged by Eastpointe Transitional Living. Please see accompanying Brief in Support for the reasons stated.

BRIEF IN SUPPORT OF DEFENDANT STATE FARM'S MOTION IN LIMINE TO STRIKE OR EXCLUDE FEES CHARGED BY EASTPOINTE TRANSITIONAL LIVING

FACTS

This is an action by the plaintiff to recover personal protection insurance benefits from the defendant arising out of an automobile accident that occurred on or about January 25, 2008. As part of the plaintiff's claim, it is asserted that she required 24 hour supervision due to her alleged traumatic [brain injury](#). She was referred to Eastpointe Transitional Living ("Eastpointe") where she was a "resident," for several months. Through this lawsuit, the plaintiff is claiming that State Farm is obligated to pay Eastpointe's fees, which total roughly \$40,000. (Exhibit A)

According to Eastpointe's own literature, the average stay is 3-9 months. (Exhibit B) Consequently, Eastpointe refers to the individuals it is assisting as "residents." (Dep. of Earl Allard, Pg. 7, attached as Exhibit C) Further, according to Eastpointe: "[Brain injured](#) people often have difficulty managing and complying with medical treatment. At ETL [Eastpointe] we provide a temporary 'home away from home'..." (Exhibit B)

However, Eastpointe does not hold any licenses issued by the State of Michigan. (Dep. of Earl Allard, Pg. 46 attached as Exhibit C) According to [MCL 400.703](#), Eastpointe meets the criteria of an Adult Foster Care Facility and therefore must be licensed as such by the State of Michigan. Because it did not possess the requisite license at the time the services were provided, the services were not lawfully rendered for purposes of the No-Fault Act. Consequently, State Farm is not obligated to pay its fees.

ARGUMENT

A. EASTPOINTE'S SERVICES ON BEHALF OF THE PLAINTIFF ARE NOT ALLOWABLE BENEFITS UNDER THE NO-FAULT ACT.

[MCL §500.3107\(1\)\(a\)](#) provides that personal protection insurance benefits are payable for all “reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person’s care, recovery, or rehabilitation.”

Additionally, [MCL §500.3157](#) provides:

A physician, hospital, clinic, or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance...may charge a reasonable amount for the products, services, and accommodations rendered.

In *Cherry v State Farm Mutual Automobile Insurance Company*, 195 Mich. App. 316, 320 (1992), the court interpreted §3107 in conjunction with §3157, in concluding that:

The Legislature intended that only treatment lawfully rendered, including being in compliance with licensing requirements, is subject to payment as a no-fault benefit.

See also, in accord, *Hoffman v Auto Club Insurance*, 211 Mich. App. 55; 535 N.W.2d 529 (1995).

In *The Healing Place v Allstate Insurance Company*, 277 Mich. App. 51 (2007), the Court dealt with a similar issue as is presented herein. In that case, the insured had sustained a traumatic [brain injury](#) from an automobile accident. He was then treated through a program offered by New Start, The Healing Place, and The Healing Place at North Oakland Medical Center. The services he allegedly received were “part of an integrated program for [brain injury](#), psychiatric disorders, and/or substance abuse.” His claims were denied by Allstate, who argued, in part, that claims for benefits were for services not “lawfully rendered,” pursuant to the No-Fault Act.

The issue in *The Healing Place*, was whether the services were “lawfully rendered” under [MCL §500.3157](#). The Michigan Court of Appeals held:

The plain language of [Mich. Comp. Laws §500.3157](#) requires that before compensation for providing reasonable and necessary services can be obtained, the provider of treatment, whether a natural person or an institution, *must be licensed* in order to be “lawfully rendering treatment.” If both the individual and the institution were required to be licensed and either was not, the “lawfully rendered” requirement is unsatisfied.

Id., at 58 (emphasis added.)

In that case, Allstate submitted evidence which established The Healing Place at North Oakland Medical Center was required to be licensed as a psychiatric hospital unit, and that The Healing Place had no license at all, and that New Start provided services that required a license to operate as an “adult foster care facility.” *Id.* at 57. In doing so, Allstate presented testimony of Roman Frankel in establishing that the services rendered were in the nature of psychiatric and/or adult foster care services, outside of operating licenses that were otherwise required. *Id.* at 58.

The Court of Appeals ultimately held that The Healing Place, The Healing Place at North Oakland Medical Center, and New Start, were not properly licensed, and as a result the services were not “legally rendered” under the No-Fault Act, and thus, not compensable. *Id.*, at 58.

B. EASTPOINTE IS ESSENTIALLY AN UNLICENSED ADULT FOSTER CARE FACILITY.

MCL §400.703(4) defines an adult foster care facility as:

A governmental or non-governmental establishment that provides foster care to adults. Subject to §26(a)(1), adult foster care facility includes facilities and foster care family homes for adults who are aged, mentally ill, developmentally disabled, or physically disabled who require supervision on an ongoing basis but who do not require continuous nursing care...

Furthermore, MCL 400.704(6) defines “foster care” as:

The provision of supervision, personal care, and protection in addition to room and board, for 24 hours a day, five or more days a week, and for two or more consecutive weeks of compensation.

MCL 400.706(1) defines “personal care” as:

Personal assistance provided by a licensed or an agent or employee of a licensee to a resident who requires assistance with dressing, personal hygiene, grooming, maintenance of a medication schedule as directed and supervised by the resident's physician, or the development of the personal and social skills required to live in the least restrictive environment.

MCL 400.706(2) The statute defines “physical disability” as:

A determinable physical characteristic of an individual that may result from disease, injury, congenital condition of birth, or functional disorder.

MCL 400.706(4) defines “protection” as:

Continual responsibility of the licensee to take reasonable action to ensure the health, safety, and well-being of a resident, including protection from physical harm, humiliation, intimidation, and social, moral, **financial**, and personal **exploitation** while on the premises, while under the supervision of the licensee or an agent or employee of the licensee, or when the resident's assessment plan states that the resident needs continuous supervision.

MCL 400.707(7) defines “supervision” as:

Guidance of a resident in the activities of daily living, including all of the following:

- (a) Reminding a resident to maintain his or her medication schedule, as directed by the resident's physician;
- (b) Reminding a resident of important activities to be carried out;
- (c) Assisting a resident in keeping appointments;

(d) Being aware of a resident's general whereabouts, even though the resident may travel independently about the community.

1. Eastpointe provides “supervision.”

According to Aimee Young, Eastpointe's Site Director, Eastpointe provides “twenty-four hour adult supervision.” (Dep. of Aimee Young, Pg. 21 attached as Exhibit D) Ms. Young also testified as follows with respect to the other services Eastpointe provides its residents -- services which fall under the aforementioned definition of “supervision:”

Q: What does that entail?

A: Scheduling for all residents, scheduling their transportation, coordinating their appointments, coordinating staff, coordinating meal planning.

(Dep. of Aimee Young, Pg. 8 attached as Exhibit D)

Q: Can you give me an example of the type of activities of daily living for which Eastpointe personnel provides assistance?

A: Assistance with meal preparation; laundry; medication reminders; daily reminders, whether it be medication, appointments; they help with scheduling of their appointments, a schedule, weekly -- like a weekly planner, things of that nature.

(Dep. of Aimee Young, Pg. 26 attached as Exhibit D)

Clearly Eastpointe provides “supervision” as that term is defined by the Adult Foster Care Facility statute. ([MCL 400.707\(7\)](#))

2. Eastpointe provides “personal care.”

Ms. Young testified as follows:

Q: Services such as assistance with dressing or bathing, or things like that, does Eastpointe Transitional Living provide those types of services?

A: Those are considered basic activities of daily living. If necessary, yes.

(Dep. of Aimee Young, Pgs. 25-26 attached as Exhibit D)

Clearly Eastpointe provides “personal care” as that term is defined by the Adult Foster Care Facility statute. ([MCL 400.706\(1\)](#))

3. Eastpointe provides “protection.”

According to Eastpointe's October 2, 2008 Intake Report, with respect to the plaintiff: “...it is noted that Ms. Arrington will require assistance with basic ADLs [activities of daily living], *24 hour residential care for her safety*, and assistance with memory impairments.” The “PLAN” for Ms. Arrington called for “24 hour supervision.” (Exhibit E, emphasis added.)

Further, Earl Allard, Eastpointe's Managing Member, described the services that Eastpointe provides as “safety supervision” for “[p]eople with traumatic [brain injuries](#).” (Dep. of Earl Allard, Pg. 9, attached as Exhibit C)

Clearly Eastpointe provides “protection” as that term is defined by the Adult Foster Care Facility statute. ([MCL 400.706\(4\)](#))

4. Eastpointe caters to individuals with a “physical disability.”

Pursuant to [MCL 400.706\(2\)](#), a “physical disability” is a determinable physical characteristic that may result from an “injury.” According to Eastpointe's own literature, its goal is “[t]o provide comfort and supervision *to the injured* on a short term basis.” (Exhibit B, emphasis added). And, as indicated above, Earl Allard, Eastpointe's Managing Member, described the services that Eastpointe provides as “safety supervision” for “[p]eople with traumatic [brain injuries](#).” (Dep. of Earl Allard, Pg. 9, attached as Exhibit C)

Clearly Eastpointe's services extend exclusively to those individuals with “physical disabilities” as that term is defined by the Adult Foster Care Facility statute.

5. Plaintiff was a resident at Eastpointe for several months.

[MCL 400.704\(6\)](#) defines “foster care” as:

The provision of supervision, personal care, and protection in addition to room and board, for 24 hours a day, five or more days a week, and for two or more consecutive weeks of compensation.

It is undisputed that the plaintiff was a resident at Eastpointe for several months.

Further, as indicated above, according to Eastpointe's own literature, the average stay is 3-9 months. (Exhibit B)

Based upon the aforementioned, it is evident that every characteristic and attribute of an organization required to hold an “adult foster care” license, are being carried out and administered by Eastpointe. However, Eastpointe admittedly does not hold the requisite license to render the adult foster care services it provided the plaintiff. (Dep. of Earl Allard, Pg. 46, attached as Exhibit C).

C. PLAINTIFF'S EXPERT, HOWARD SCHAEFER ADMITTED THAT HE IS NOT QUALIFIED TO MAKE A DETERMINATION AS TO WHETHER EASTPONTE IS AN ADULT FOSTER CARE FACILITY.

In anticipation of potential licensing issues arising for Eastpointe, plaintiff obtained the affidavit of Howard Schaefer, an employee of the State of Michigan Department of Community Health. (Schaefer Affidavit, attached as Exhibit F) According to Mr. Schaefer's affidavit, Eastpointe did not require a license in order to provide its services to the public -- *based on what he was told of the facility by plaintiff's attorney*. However, during his deposition, Mr. Schaefer demonstrated that he did not have all facts about Eastpointe and was otherwise not qualified to offer such an opinion with respect to Adult Foster Care Facilities.

Q: And for a foster care facility, what does request for a new license entail?

A: I'm not qualified to answer that.

(Dep. of Howard Schaefer, Pg. 18, attached as Exhibit G)

Q: And do you know what Eastpointe Transitional Living is?

A: At the time that Mr. Carlisle called me, it was described to me in terms that lead me to believe it was an assisted living or semi-independent living facility, and that's the extent of my knowledge.

(Dep. of Howard Schaefer, Pg. 21, attached as Exhibit G)

Q: Okay. Do you know what services the employees at Eastpointe Transitional Living provide?

A: Mr. Carlisle explained that to me when we spoke, but I don't believe that I can recall accurately the services that he described.

Q: ...Were you provided with any records to review regarding the services provided by Eastpointe Transitional Living?

A: I was not.

Q: ...Nor were you provided with any access to the employees in order to speak to them and find out what their duties were, correct?

A: Correct.

Q: ...Are you aware of whether there were any patients there who were physically disabled or mentally ill?

A: I have no facts about the patients or people who lived there.

(Dep. of Howard Schaefer, Pgs. 23, 25-27, attached as Exhibit G)

Mr. Schaefer also testified that he was not familiar with the statutory definition of an adult foster care facility, had never reviewed Eastpointe's brochure outlining the services it provides, did not have details of the kinds of patients Eastpointe was designed to care for, and was not provided specific information relative to the nature of supervision, personal care or protection provided by Eastpointe -- *all of which are critical* to the analysis of whether Eastpointe requires a license under the Adult Foster Care Facility statute. (Dep. of Howard Schaefer, Pgs. 29-30, 34, 41, attached as Exhibit G) This would explain why Mr. Schaefer ultimately concluded that he was *not qualified* to make a determination as to whether or not Eastpointe could be classified as an Adult Foster Care Facility, for purposes of Michigan law and licensing requirements. (Dep. of Howard Schaefer, Pg. 41, attached as Exhibit G)

D. The Healing Place billings should also be disallowed because it is not a licensed adult foster care facility.

[MCL §500.3157](#) provides that only “lawfully rendered treatment,” consisting of a reasonable amount for products, services, and accommodations rendered, may be charged by a physician, hospital, clinic, or other person. If an activity is found to be unlawful, then any expense relating to that activity is not subject to payment as a no-fault benefit. *Hoffman v ACIA*, 211 Mich. App. 55, 64-65; 535 N.W.2d 529 (1995).

It is clear that the services that Eastpointe is providing fit squarely within the statutory definition of an Adult Foster Car Facility. Consequently, it is required to be licensed by the State of Michigan. Because it was not licensed, its services were not “lawfully rendered.” Pursuant to the aforementioned case law, Stae Farm is not obligated to pay its bills.

WHEREFORE, the defendant, State Farm Mutual Automobile Insurance Company, respectfully requests that this Honorable Court enter an order striking or excluding the fees charged by Eastpointe Transitional Living.

Respectfully submitted,

MIZEROWSKI SMITH, P.C.

<<signature>>

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DATED: March 3, 2011

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